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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

CESAR ALEXIS ORTEGAMUNOZ,

Defendant and Appellant.

E069676

(Super.Ct.No. RIF1605332)

OPINION

APPEAL from the Superior Court of Riverside County. Charles J. Koosed, Judge.
Affirmed.

Tasha G. Timbadia, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Arlene A. Sevidal, Andrew Mestman and Collette C. Cavalier, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant and defendant Cesar Alexis Ortégamunoz was charged by information with criminal threats (Pen. Code, § 422, count 1)¹ and assault with a deadly weapon other than a firearm (a glass bottle) (§ 245, subd. (a)(1), count 2). As to count 1, it was alleged that defendant personally used a deadly and dangerous weapon. (§§ 12022, subd. (b)(1) & 1192.7, subd. (c)(23).) A jury found him guilty of count 2, but not guilty of count 1. A trial court sentenced him to two years in state prison.

On appeal, defendant contends that the trial court erred when it gave the jury CALCRIM No. 875, which defined a “deadly weapon” as “inherently deadly.” Since the glass bottle he possessed is not an “inherently deadly” weapon, as a matter of law, such error resulted in prejudice, and the conviction must be reversed. We affirm.

FACTUAL BACKGROUND

N.G. (the victim) lived about a block and a half away from defendant, on the same street. On October 22, 2016, he saw defendant speed past his house and almost lose control of his car. The victim and his brother went to talk to defendant. They drove to his house, where his sister was standing in the driveway. The victim asked to talk to defendant.

Defendant came out of the house, and the victim asked if he was “driving the Camry.” Defendant said, “yeah,” and then pushed him and started swinging a glass bottle at him. Defendant hit the back of the victim’s head with the bottle. The bottle

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

broke and left a big welt on his head. Defendant, his brother, and a third man “jumped” the victim. Defendant kicked the victim, hit him with his fists, and dragged him to the street. Defendant said, “I’ll kill you, dog.”

As a result of this incident, the victim suffered multiple injuries. His eye was bleeding, he had cuts on his hands, knuckles, palms, knees, and elbow, and his face and ribs were bruised.

A few days after the incident, the police contacted defendant. Defendant admitted he got into a physical altercation with the victim. He said he had a glass bottle but threw it to the ground prior to fighting with the victim.

At trial, the victim’s brother testified that he sat in the car and videotaped the incident. The video recording was played for the jury. The victim’s brother testified that he saw defendant hit his brother on the head with the bottle, and the bottom of the bottle broke.

ANALYSIS

Any Error in the Court’s Instruction Was Not Prejudicial

In the jury instructions, the trial court defined a “deadly weapon” to mean “any object, instrument, or weapon *that is inherently deadly* or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.” (Italics added.) Because a glass bottle is not an inherently deadly weapon, defendant contends that the court erred in referring to a weapon that is inherently deadly. He therefore claims the conviction of assault with a deadly weapon must be reversed. We disagree.

Defendant relies upon *People v. Aledamat* (2018) 20 Cal.App.5th 1149, 229 (*Aledamat*), review granted July 5, 2018, S248105. We will assume, without deciding, that the court of appeal’s reasoning in *Aledamat* was correct. (See Cal. Rules of Court, rule 8.1115(e)(1) [“Pending review and filing of the Supreme Court’s opinion, unless otherwise ordered by the Supreme Court . . . a published opinion of a Court of Appeal in the matter has no binding or precedential effect, and may be cited for potentially persuasive value only”].) In doing so, we conclude there was no reversible error here.

In *Aledamat*, the defendant was convicted of assault with a deadly weapon (§ 245, subd. (a)(1)) with personal use of a deadly weapon (§ 12022, subd. (b)(1)), based on evidence that he “pulled a box cutter out of his pocket and extended the blade,” and then, “from three or four feet away, [he] thrust the blade at the [victim] at waist level, saying, ‘I’ll kill you.’ ” (*Aledamat, supra*, 20 Cal.App.5th at p. 1152.)

As the *Aledamat* court explained, “For purposes of both assault with a deadly weapon and the enhancement for personal use of a deadly weapon, an object or instrument can be a ‘deadly weapon’ if it is either (1) ‘inherently deadly’ (or ‘deadly per se’ or a ‘deadly weapon[] as a matter of law’) because it is dangerous or deadly to others in ‘the ordinary use for which [it is] designed,’ or (2) ‘used . . . in a manner’ ‘capable of’ ’ and ‘likely to produce death or great bodily injury,’ taking into account ‘the nature of the object, the manner in which it is used, and all other facts relevant to the issue.’ [Citations.] A box cutter is a type of knife, and ‘a knife’—because it is designed to cut things and not people—‘is not an inherently dangerous or deadly instrument as a matter of law.’ [Citation.]” (*Aledamat, supra*, 20 Cal.App.5th at pp. 1152-1153.)

In *Aledamat*, as here, the trial court gave the jury both definitions, defining “ ‘a deadly weapon’ ” as “ ‘any object, instrument, or weapon that is inherently deadly *or* one that is used in such a way that it is capable of causing or likely to cause death or great bodily injury.’ ” (*Aledamat, supra*, 20 Cal.App.5th at p. 1152, italics added.) The court of appeal held that the trial court erred in instructing the jury that it could find the box cutter to be an “inherently deadly” weapon, since a box cutter is not an inherently dangerous weapon as a matter of law, and the instruction was therefore inapplicable. (*Id.* at p. 1153.)

The *Aledamat* court further held that reversal was required because the instructional error was prejudicial. (*Aledamat, supra*, 20 Cal.App.5th at p. 1153.) The court stated that “[w]hen an appellate court determines that a trial court has presented a jury with two theories supporting a conviction—one *legally* valid and one *legally* invalid—the conviction must be reversed ‘absent a basis in the record to find that the verdict was actually based on valid ground.’ [Citation.] That basis exists only when the jury has ‘*actually*’ relied upon the valid theory [Citations]; absent such proof, the conviction must be overturned—even if the evidence supporting the valid theory was overwhelming.” (*Aledamat, supra*, 20 Cal.App.5th at p. 1153.)

The *Aledamat* court distinguished this approach from cases in which “an appellate court determines that a trial court has presented a jury with two legally valid theories supporting a conviction—one *factually* valid (because it is supported by sufficient evidence) and one *factually* invalid (because it is not),” in which case “the conviction must be affirmed unless the ‘record affirmatively demonstrates . . . that the jury did in

fact rely on the [factually] unsupported ground.’ ” (*Aledamat, supra*, 20 Cal.App.5th at p. 1153.)

The *Aledamat* court concluded that the trial court’s instruction defining a “ ‘[deadly] weapon’ ” to include an “ ‘inherently [deadly]’ ” object “entail[ed] the presentation of a *legally* (rather than *factually*) invalid theory,” since a box cutter was not an inherently deadly weapon “ ‘as a matter of law.’ ” (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.)² Thus, the court vacated the conviction because there was “no basis in the record for concluding that the jury relied on the alternative definition of ‘deadly weapon’ (that is, the definition looking to how a noninherently dangerous weapon was actually used).” (*Ibid.*) In so finding, the court pointed out that “the prosecutor in his rebuttal argument affirmatively urged the jury to rely on the legally invalid theory when he called the box cutter an ‘inherently deadly weapon.’ ” (*Ibid.*)

In the instant case, the trial court committed error under the reasoning of *Aledamat*. As the parties agree, a glass bottle is not an “inherently deadly” weapon. Although defendant was charged with using a glass bottle, a non-inherently deadly weapon, the trial court defined a “deadly weapon” to include an inherently deadly weapon (“A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury”).

² We note that the *Aledamat* court erroneously referred to the trial court’s instruction as defining a “dangerous” weapon to include an “inherently dangerous” object. (*Aledamat, supra*, 20 Cal.App.5th at p. 1154.) The trial court actually instructed the jury on the definition of a “deadly” weapon. (*Id.* at p. 1152.)

However, unlike *Aledamat*, the record here shows that the jury relied on the legally valid theory that defendant used a glass bottle in such a way as to be capable of causing and likely to cause great bodily injury. Defendant was charged in count 2 with assault with a deadly weapon other than a firearm. The jury was instructed on the elements of that crime, in relevant part, as follows: To prove that the defendant is guilty of the crime of assault with a deadly weapon other than a firearm, “the People must prove that: [¶] 1. The defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person; [¶] 2. The defendant did that act willfully; [¶] 3. When the defendant acted, he was aware of facts that would lead a reasonable person to realize that his act by its nature would directly and probably result in the application of force to someone; AND [¶] 4. When the defendant acted, he had the present ability to apply force with a deadly weapon other than a firearm to a person.” The jury was also instructed: “A deadly weapon other than a firearm is any object, instrument, or weapon that is inherently deadly or *one that is used in such a way that it is capable of causing and likely to cause death or great bodily injury.*”

During closing arguments, the prosecutor argued the following: “Let’s go through the elements of assault with a deadly weapon. The first element is that the defendant did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person. [¶] When he’s using that bottle in his hand and swinging it, in fact hitting [the victim] in the back of the head, that’s an act with that weapon that by its nature, swinging that bottle at [the victim], that directly and

probably would result in the application of force via that bottle onto another person.” He reiterated, “Taking that bottle in that situation with that anger, that aggression, that violence, and hitting [the victim] with it, that’s using that bottle and creating in that bottle a deadly weapon that is capable of causing and in fact likely would have caused death or great bodily injury.”

The evidence here showed that defendant swung a glass bottle and broke it on the back of the victim’s head. Based on this evidence of how defendant used the bottle in committing the assault, the jury convicted him of assault with a deadly weapon other than a firearm. In the words of the instruction, defendant willfully “did an act with a deadly weapon other than a firearm that by its nature would directly and probably result in the application of force to a person,” with “the present ability to apply force with a deadly weapon other than a firearm to a person.” Unlike the prosecutor in *Aledamat*, the prosecutor here did not refer to the glass bottle as an “ ‘inherently deadly weapon.’ ” (See *Aledamat*, *supra*, 20 Cal.App.5th at p. 1152.) Rather, he clearly presented to the jury the theory that defendant used the glass bottle as a weapon to attack the victim. Thus, the jury necessarily found that he used the glass bottle in a manner “capable of causing and likely to cause death or great bodily injury,” “taking into account ‘the nature of the object, the manner in which it is used, and all other facts relevant to the issue.’ ” (*Aledamat*, *supra*, 20 Cal.App.5th at p. 1153.) In other words, there is a basis in the record to conclude that the jury properly relied on the alternative definition of a deadly weapon.

Defendant points out that the verdict form given to the jury stated that he had been charged with “assault with a deadly *or dangerous* weapon.” (Italics added.) He claims that the inclusion of the words “or dangerous” “increased the likelihood that the jurors based their conviction on a legally improper definition of the glass bottle.” This claim is purely speculative. Moreover, the jury instruction clearly stated that defendant was charged with “assault with a deadly weapon other than a firearm” and that, in order to find him guilty, the People were required to prove that “defendant did an act with a deadly weapon other than a firearm” There was no mention of a “dangerous” weapon in the jury instruction. We presume the jury followed these instructions in returning a verdict of guilty. (*People v. Chavez* (1958) 50 Cal.2d 778, 790.)

Therefore, assuming the reasoning of *Aledamat* is correct, any error in including the reference to an “inherently deadly weapon” does not require reversal of defendant’s conviction of assault with a deadly weapon other than a firearm.

DISPOSITION

The judgment is affirmed.

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McKINSTER
Acting P.J.

We concur:

SLOUGH
J.

MENETREZ
J.